

TERRY L. DUGAN,)
)
 Plaintiff,) No. CV-08-0183-CI
)
)
 v.) ORDER GRANTING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
) AND REMANDING FOR ADDITIONAL
) PROCEEDINGS PURSUANT TO
) SENTENCE FOUR 42 U.S.C. §
) 405(g)
)
 Defendant.)

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 11, 13.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney David R. Johnson represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 3.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, **DENIES** Defendant's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings.

Plaintiff Terry L. Dugan (Plaintiff) protectively filed for disability insurance benefits (DIB) and for social security income (SSI) on June 7, 2006. (Tr. 161.) Plaintiff initially alleged an onset date of August 1, 2000. (Tr. 161.) Benefits were denied initially and on reconsideration. (Tr. 88, 94.) Plaintiff requested

1 a hearing before an administrative law judge (ALJ), which was held
2 before ALJ Hayward C. Reed on September 26, 2007. (Tr. 25-79.)
3 Plaintiff was represented by counsel and testified at the hearing. At
4 the hearing, Plaintiff amended the alleged onset date to January 1,
5 2004. (Tr. 27.) The ALJ denied benefits (Tr. 10-21) and the Appeals
6 Council denied review. (Tr. 3.) The instant matter is before this
7 court pursuant to 42 U.S.C. § 405(g).

8 **STATEMENT OF FACTS**

9 The facts of the case are set forth in the administrative hearing
10 transcripts, and will therefore only be summarized here.

11 At the time of the hearing, Plaintiff was 50 years old. (Tr.
12 478.) She quit school in the eighth grade. (Tr. 56.) Plaintiff has
13 previous work experience as a bartender, caregiver, dishwasher,
14 laundry worker, housekeeper, and hotel cleaner. (Tr. 60-61, 123.)
15 Plaintiff testified the physical problems preventing her from working
16 are problems with her back and knees. (Tr. 66.) She alleged she
17 hears voices every day and the voices are not as strong when she takes
18 medication. (Tr. 64.) Plaintiff admitted she has had drug problems
19 throughout most of her life. (Tr. 62.) She has been arrested for
20 possession of marijuana and tested positive for methamphetamine while
21 in a drug treatment program. (Tr. 62-63.)

22 **STANDARD OF REVIEW**

23 Congress has provided a limited scope of judicial review of a
24 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold the
25 Commissioner's decision, made through an ALJ, when the determination
26 is not based on legal error and is supported by substantial evidence.
27 See *Jones v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985); *Tackett v.*
28 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). "The [Commissioner's]

determination that a plaintiff is not disabled will be upheld if the findings of fact are supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). Substantial evidence "means such evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

It is the role of the trier of fact, not this Court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the Court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Sec'y of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a

1 finding of either disability or nondisability, the finding of the
2 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
3 1230 (9th Cir. 1987).

4 SEQUENTIAL PROCESS

5 The Social Security Act (the "Act") defines "disability" as the
6 "inability to engage in any substantial gainful activity by reason of
7 any medically determinable physical or mental impairment which can be
8 expected to result in death or which has lasted or can be expected to
9 last for a continuous period of not less than twelve months." 42
10 U.S.C. §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides that
11 a Plaintiff shall be determined to be under a disability only if his
12 impairments are of such severity that Plaintiff is not only unable to
13 do his previous work but cannot, considering Plaintiff's age,
14 education and work experiences, engage in any other substantial
15 gainful work which exists in the national economy. 42 U.S.C. §§
16 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability
17 consists of both medical and vocational components. *Edlund v.*
18 *Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

19 The Commissioner has established a five-step sequential
20 evaluation process for determining whether a claimant is disabled. 20
21 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is
22 engaged in substantial gainful activities. If the claimant is engaged
23 in substantial gainful activities, benefits are denied. 20 C.F.R. §§
24 404.1520(a)(4)(I), 416.920(a)(4)(I).

25 If the claimant is not engaged in substantial gainful activities,
26 the decision maker proceeds to step two and determines whether the
27 claimant has a medically severe impairment or combination of
28 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If

1 the claimant does not have a severe impairment or combination of
2 impairments, the disability claim is denied.

3 If the impairment is severe, the evaluation proceeds to the third
4 step, which compares the claimant's impairment with a number of listed
5 impairments acknowledged by the Commissioner to be so severe as to
6 preclude substantial gainful activity. 20 C.F.R. §§
7 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404, Subpt. P, App.
8 1. If the impairment meets or equals one of the listed impairments,
9 the claimant is conclusively presumed to be disabled.

10 If the impairment is not one conclusively presumed to be
11 disabling, the evaluation proceeds to the fourth step, which
12 determines whether the impairment prevents the claimant from
13 performing work he or she has performed in the past. If plaintiff is
14 able to perform his or her previous work, the claimant is not
15 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
16 this step, the claimant's residual functional capacity ("RFC")
17 assessment is considered.

18 If the claimant cannot perform this work, the fifth and final
19 step in the process determines whether the claimant is able to perform
20 other work in the national economy in view of his or her residual
21 functional capacity and age, education and past work experience. 20
22 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*, 482
23 U.S. 137 (1987).

24 The initial burden of proof rests upon the claimant to establish
25 a *prima facie* case of entitlement to disability benefits. *Rhinehart*
26 *v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d
27 1111, 1113 (9th Cir. 1999). The initial burden is met once the
28 claimant establishes that a physical or mental impairment prevents him

1 from engaging in his or her previous occupation. The burden then
2 shifts, at step five, to the Commissioner to show that (1) the
3 claimant can perform other substantial gainful activity, and (2) a
4 "significant number of jobs exist in the national economy" which the
5 claimant can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir.
6 1984).

7 **ALJ'S FINDINGS**

8 At step one of the sequential evaluation process, the ALJ found
9 Plaintiff has not engaged in substantial gainful activity since
10 January 1, 2004, the amended alleged onset date. (Tr. 13.) At step
11 two, he found Plaintiff has the severe impairments of polysubstance
12 dependence, depression, back and knee pain, and obesity. (Tr. 13.) At
13 step three, the ALJ found Plaintiff's impairments, including the
14 substance use disorders, meet sections 12.04 and 12.09 of 20 C.F.R.,
15 Appendix 1, Subpart P, Appendix 1 (Listings). (Tr. 14.)

16 Next, the ALJ concluded if Plaintiff stopped substance abuse, the
17 remaining limitations would cause more than a minimal impact on the
18 claimant's ability to perform basic work activities; therefore,
19 Plaintiff would have a severe impairment or combination of
20 impairments. (Tr. 15.) The ALJ then found if Plaintiff stopped
21 substance use, she would not have an impairment or combination of
22 impairments that meets or medically equals any of the impairments
23 listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (Tr. 16.)

24 The ALJ further determined if Plaintiff stopped the substance
25 use, "The claimant would have the residual functional capacity to
26 perform medium work except the claimant has no restriction of
27 activities of daily living, but mild difficulty in maintaining social
28 functioning and mild difficulties in maintaining concentration,

1 persistence, or pace." (Tr. 17.) At step four, the ALJ found
2 Plaintiff would be able to perform past relevant work as a child care
3 provider, hotel cleaner, or dishwasher, if she stopped the substance
4 abuse. (Tr. 20.) The ALJ concluded that because Plaintiff would not
5 be disabled if she stopped the substance use, the claimant's substance
6 use disorder is a contributing factor material to the determination of
7 disability. Thus, the claimant has not been disabled within the
8 meaning of the Social Security Act at any time from the amended
9 alleged onset date through the date of the decision. (Tr. 21.)

10 ISSUES

11 The question is whether the ALJ's decision is supported by
12 substantial evidence and free of legal error. Specifically, Plaintiff
13 asserts the ALJ erred by improperly considering psychological opinion
14 evidence. (Ct. Rec. 12 at 13-14.) Plaintiff also argues new evidence
15 submitted to the Appeals Council requires remand. (Ct. Rec. 12 at 14-
16 16.) Defendant asserts the ALJ's analysis of the medical evidence was
17 sufficiently supported and the new evidence submitted to the Appeals
18 Council does not warrant remand. (Ct. Rec. 14 at 12-19.)

19 DISCUSSION

20 A. Sequential Evaluation in the Context of Substance Abuse

21 The Contract with America Advancement Act of 1996 (CAAA) amended
22 the Social Security Act, providing that "an individual shall not be
23 considered to be disabled . . . if alcoholism or drug addiction would
24 . . . be a contributing factor material to the Commissioner's
25 determination that the individual is disabled." 42 U.S.C.
26 423(d)(2)(C). Special statutes and regulations govern disability
27 claims involving substance abuse.

28 Under the Regulations implemented by the Commissioner, the ALJ

1 must follow a specific analysis that incorporates the sequential
2 evaluation discussed above. 20 C.F.R. §§ 404.1535(a), 416.935(a).
3 The ALJ must conduct the five-step inquiry without attempting to
4 determine the impact of substance addiction. If the ALJ finds the
5 claimant is not disabled under the five-step inquiry, the claimant is
6 not entitled to benefits, and there is no need to proceed with further
7 analysis. *Id.* If the ALJ finds the claimant disabled, and there is
8 evidence of substance addiction, the ALJ should proceed under the
9 sequential evaluation and §§ 404.1535 or 416.935 to determine if the
10 claimant would still be disabled absent the substance addiction.
11 *Bustamante v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001.) If the
12 claimant is found disabled with the effects of substance addiction, it
13 is the claimant's burden to prove substance addiction is not a
14 contributing factor material to her disability. *Parra v. Astrue*, 481
15 F.3d 742, 748 (9th Cir. 2007). As stated by the *Parra* court, a drug
16 addicted claimant "who presents inconclusive evidence of materiality
17 has no incentive to stop [abusing drugs], because abstinence may
18 resolve his disabling limitations and cause his claim to be rejected
19 or his benefits terminated." *Id.* Thus, through the CAAA, Congress
20 seeks "to discourage alcohol and drug abuse, or at least not to
21 encourage it with a permanent government subsidy." *Ball v. Massanari*,
22 254 F.3d at 817, 824 (9th Cir. 2001).

23 In this case, the ALJ properly conducted the sequential analysis
24 and determined that Plaintiff's impairments meet the Listings without
25 attempting to determine the effect of substance addiction. (Tr. 14.)
26 The ALJ then determined that without substance abuse, Plaintiff would
27 have a severe impairment, but no impairment or combination of
28 impairments would meet or medically equal the Listings. (Tr. 16.)

1 The ALJ next determined Plaintiff's residual functional capacity
2 without substance abuse and concluded Plaintiff could return to past
3 work if she stopped substance abuse. (Tr. 20.) Thus, the ALJ
4 concluded Plaintiff would not be disabled without the effects of
5 substance abuse and therefore Plaintiff's substance use disorder is a
6 contributing factor material to the determination of disability. (Tr.
7 21.) Plaintiff's assignments of error are focused on the weight given
8 to the medical evidence in determining Plaintiff's residual functional
9 without substance abuse. (Ct. Rec. 12 at 13-16.)

10 **B. Medical Opinions**

11 The ALJ must consider the opinions of acceptable medical sources
12 about the nature and severity of the Plaintiff's impairments and
13 limitations. 20 C.F.R. §§ 404.1527, 416.927; S.S.R. 96-2p; S.S.R. 96-
14 6p. A treating or examining physician's opinion is given more weight
15 than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d
16 587, 592 (9th Cir. 2004). If the treating or examining physician's
17 opinions are not contradicted, they can be rejected only with "clear
18 and convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
19 1996). If contradicted, the ALJ may reject the opinion if he states
20 specific, legitimate reasons that are supported by substantial
21 evidence. See *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d
22 1453, 1463 (9th Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747,
23 753 (9th Cir. 1989); *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989).
24 Historically, the courts have recognized conflicting medical evidence,
25 the absence of regular medical treatment during the alleged period of
26 disability, and the lack of medical support for doctors' reports based
27 substantially on a claimant's subjective complaints of pain, as
28 specific, legitimate reasons for disregarding the treating physician's

1 opinion. See *Flaten*, 44 F.3d at 1463-64; *Fair*, 885 F.2d at 604.

2 **1. Dr. Mabee**

3 The record includes a narrative report dated February 15, 2007,
4 and a DSHS psychological assessment form dated March 1, 2007, prepared
5 by an examining physician, Dr. Scott Mabee, and Kristin Sims, a
6 licensed mental health counselor.¹ (Tr. 256-64.) Dr. Mabee diagnosed
7 schizophrenia, cannabis dependence in early partial remission, and
8 amphetamine dependence in sustained full remission. (Tr. 257, 263.)
9 Dr. Mabee assessed three severe and four marked functional limitations
10 in Plaintiff's cognitive and social abilities. (Tr. 258.) The ALJ
11 accorded little weight to Dr. Mabee's assessment. (Tr. 19.)

12 Dr. Mabee's report conflicts with the opinion of Dr. Klein, the
13 medical expert. Dr. Klein testified there is no evidence Plaintiff
14 suffers from schizophrenia absent drug and alcohol abuse and diagnosed
15 drug and alcohol abuse and depressive disorder. (Tr. 30-31.) Dr.
16 Klein also assessed only mild social restriction and mild restriction
17

18 ¹Ms. Sims is listed as the examining professional on the DSHS
19 psychological evaluation form dated March 1, 2007; Dr. Mabee signed as
20 the releasing authority. (Tr. 259.) The narrative psychological
21 evaluation dated February 15, 2007, is signed by both Ms. Sims and Dr.
22 Mabee. (Tr. 264.) In a letter dated October 11, 2007, Dr. Mabee
23 indicated that Ms. Sims evaluated Plaintiff on February 15, 2007, and
24 he reviewed the findings in her report before submitting the report to
25 the DSHS caseworker. (Tr. 319.) The ALJ referred to the contents of
26 the DSHS form as Ms. Sims' diagnosis, findings and assessment. (Tr.
27 14, 19.) For clarity, the February 2007 assessment and March 2007
28 DSHS evaluation are referenced herein as the opinions of Dr. Mabee.

1 of concentration, persistence and pace. (Tr. 31.) Because Dr.
2 Mabee's report was contradicted by Dr. Klein, the ALJ was required to
3 provide specific, legitimate reasons for rejecting Dr. Mabee's report.

4 The ALJ listed a number of reasons for rejecting Dr. Mabee's
5 report. First, he noted the assessment was "a checkblock form report
6 of a single examination." (Tr. 19.) The ALJ correctly pointed out
7 that opinions on a check-box form or form reports which do not contain
8 significant explanation of the basis for the conclusions may accorded
9 little or no weight. See *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir.
10 1996); *Johnson v. Chater*, 87 F.3d 1015, 1018 (9th Cir. 1996). However,
11 the ALJ appears to have overlooked the narrative attachment twice
12 referenced by Dr. Mabee on the DSHS form under the heading "Functional
13 Limitations." (Tr. 258, 260-65.) Dr. Mabee's narrative provides a
14 detailed explanation of the basis for his opinion, including the
15 results of the diagnostic interview, mental status examination, and
16 six objective tests administered in arriving at his conclusions. (Tr.
17 260-65.) Thus, the ALJ's implication that Dr. Mabee's report deserved
18 less weight because it was an inadequately explained check-box form is
19 not supported by the record and is, therefore, not a legitimate reason
20 for rejecting the report.

21 Furthermore, the opinions of examining physicians must be
22 considered by the ALJ. See 20 C.F.R. § 404.1527; *Lester v. Chater*, 81
23 F.3d 821, 830 (9th Cir. 1995). By definition, an examining physician
24 does not have an ongoing relationship with a claimant. The ALJ's
25 suggestion that Dr. Mabee's report is inadequate because it is the
26 result of a one-time examination leads to the conclusion that the
27 opinions of all examining physicians or psychologists should be
28 discarded. By that reasoning, it would follow that Dr. Klein's report

1 should also be discarded, as he never examined Plaintiff. The
2 regulations and case law require consideration and appropriate
3 weighting of examining physician opinions. *Id.* Thus, the ALJ's
4 implication that Dr. Mabee's report based on a one-time exam should be
5 rejected is erroneous.

6 Second, the ALJ pointed out the report "was predicated on self-
7 report in a secondary gain context." (Tr. 19.) As explained above,
8 Dr. Mabee's narrative shows the results of numerous objective tests
9 considered in addition to Plaintiff's self-report. The ALJ's
10 assertion that the report is based on self-report is not supported by
11 the record and is therefore not a specific, legitimate reason for
12 rejecting Dr. Mabee's report.

13 The third reason given by the ALJ for rejecting Dr. Mabee's
14 report is the DSHS form completed by Dr. Mabee does not distinguish
15 between the level of impairment with and without drug and alcohol
16 abuse. (Tr. 19.) However, section F of the DSHS form is entitled
17 "Substance Abuse." (Tr. 257-58.) In that section of the report, Dr.
18 Mabee opined, "No diagnosed condition likely caused by alcohol or drug
19 abuse"; "Alcohol and/or drug treatment won't decrease severity of
20 schizophrenia"; and, "It is not likely that the present level of drug
21 abuse exacerbates other diagnosed condition." (Tr. 257-58.) Dr.
22 Mabee also indicated that sixty days of abstinence from alcohol or
23 drug use would have "[n]o effect on diagnosed condition of
24 schizophrenia." (Tr. 257.) Dr. Mabee was clear that his diagnosis of
25 schizophrenia exists notwithstanding Plaintiff's substance abuse.
26 While the ALJ is correct that the form does not specifically
27 distinguish the assessment of limitations with and without the effects
28 of substance abuse, Dr. Mabee's statement that Plaintiff's current

1 level of drug abuse does not exacerbate Plaintiff's condition suggests
2 his assessment of limitations would remain the same with or without
3 the effects of Plaintiff's drug and alcohol abuse. This is also
4 confirmed by Dr. Mabee's letter to the ALJ dated October 11, 2007.²
5 (Tr. 319-20.) Thus, the ALJ's third reason for rejecting Dr. Mabee's
6 opinion is not supported by the record and does not constitute a
7 specific, legitimate reason for rejecting the report.

8 The ALJ's fourth reason for rejecting Dr. Mabee's report was "the
9 evaluation of the claimant was done while the claimant was still
10 abusing drugs and alcohol." (Tr. 19.) The ALJ noted that in March
11 2007, Dr. Mabee diagnosed Plaintiff's cannabis dependence "in early
12 partial remission." (Tr. 14.) The ALJ also cited a psychological
13 assessment and counseling records from Family Services Spokane in
14 March and April 2007 which indicate Plaintiff said she still drinks
15 and would use marijuana the rest of her life. (Tr. 14, 279, 289.)
16 However, as discussed above, Dr. Mabee's opinion took into account the
17 effect of drug abuse on Plaintiff's condition. Thus, this is not an
18 appropriate reason for rejecting Dr. Mabee's report.

19 A fifth justification offered by the ALJ in rejecting Dr. Mabee's
20 report is the definition of "marked" on the DSHS form differs from the
21 definition contained in the regulations for assessing mental health
22 disorders. The ALJ also noted comments on the DSHS form show the
23 standards for completing the form and the public interest served by
24 the form are different from the standards and objectives of the Social
25 Security Administration procedures. (Tr. 19.) The ALJ asserts that

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27 ²The ALJ's consideration of Dr. Mabee's letter dated October 11,
28 2007, is discussed in detail below.

1 accordingly, Dr. Mabee's comments and findings on the public
2 assistance evaluation are not entitled to controlling weight under
3 S.S.R. 96-2p.

4 The ALJ's reasoning is erroneous. First, S.S.R. 96-2p is
5 inapplicable because it addresses the opinions of treating medical
6 sources, not examining or consulting opinions. Second, even if S.S.R.
7 96-2p did apply, when an opinion is not entitled to controlling
8 weight, it is still entitled to some weight and need not automatically
9 be rejected. S.S.R. 96-2p. Third, the purpose for which the report
10 was obtained does not provide a legitimate basis for rejecting it.
11 *Reddick v. Chater*, 157 F.3d 715, 726 (9th Cir. 1998). Finally, Dr.
12 Mabee's opinion is not limited to the terms in the DSHS. He explained
13 his opinion in detail in the accompanying narrative assessment. Thus,
14 this is not a legitimate reason for rejecting Dr. Mabee's report.

15 The ALJ also considered an explanatory letter from Dr. Mabee
16 dated October 11, 2007. (Tr. 19-20, 319-20.) As noted by the ALJ,
17 Dr. Mabee opined that although substance abuse exacerbated Plaintiff's
18 thinking disorder, it was not the sole cause of her mental health
19 problems. (Tr. 20, 319.) Dr. Mabee responded to the findings of the
20 medical expert, Dr. Kein, as expressed at the hearing, and further
21 explained the basis for his opinion. (Tr. 319-20.) The ALJ gave the
22 letter little weight because, "Dr. Mabee did not give any specific
23 limitations for the claimant or a rating under the 'B' criteria."
24 (Tr. 20.) This is not a specific, legitimate reason for rejecting Dr.
25 Mabee's opinion. The regulations require the ALJ to consider the
26 opinions of all relevant sources, not only those opinions specifically
27 addressing the existence of the functional limitations found in
28 paragraph B of the Listings. 20 C.F.R. § 404.1527. The ALJ's

1 reasoning would result in the exclusion of many significant medical
2 and psychological opinions in disability claims, contrary to the
3 regulations.

4 Adequate reasons for rejecting Dr. Mabee's report were not
5 provided. Although specific, legitimate reasons may exist for
6 rejecting Dr. Mabee's report, the court is constrained to review only
7 those reasons asserted by the ALJ. *Sec. Exch. Comm'n v. Chenery*
8 *Corp.*, 332 U.S. 194, 196 (1947); *Pinto V. Massanari*, 249 F.3d 840,
9 847-48 (9th Cir. 2001). Here, there is error as none of the reasons
10 cited by the ALJ justify rejecting Dr. Mabee's report.

11 **2. Dr. Bonner and Dr. Layton**

12 Plaintiff also challenged the ALJ's evaluation of the opinions of
13 Spokane Mental Health providers Dr. Bonner and Dr. Layton.³ (Ct. Rec.
14 12 at 14.) Plaintiff asserts "the ALJ did not provide any reasons
15 whatsoever for rejecting the opinions of the treating physicians at
16 Spokane Mental Health." (Ct. Rec. 12 at 14.) However, the ALJ
17 addressed Dr. Bonner's and Dr. Layton's assessment by stating, "The
18 assessment done by Dr. Bonner is given little weight because his
19 diagnosis does not include substance dependence. He appeared to be
20 unaware of the claimant's continued substance use." (Tr. 19.) The
21 ALJ's explanation for the weight given to the opinion of Drs. Bonner
22 and Layton is supported by the record and is a specific, legitimate
23 reason for giving the opinion little weight in determining Plaintiff's
24

25 ³Carl Bonner, M.D., and psychiatrist Matthew Layton, M.D., Ph.D.,
26 both signed a psychiatric assessment dated June 19, 2007. (Tr. 295-
27 97.) The ALJ referenced the opinion as Dr. Bonner's assessment and
28 did not mention Dr. Layton. (Tr. 14, 19.)

1 residual functional capacity without the effects of substance abuse.

2 **3. Dr. Gentile**

3 Plaintiff also argues the ALJ's opinion of Dr. Gentile, a state
4 reviewing psychologist, was improperly rejected by the ALJ. (Ct. Rec.
5 12 at 14.) On September 26, 2006, Dr. Gentile completed a psychiatric
6 review technique form and a mental residual functional capacity
7 assessment. (Tr. 238-55.) Dr. Gentile assessed one marked limitation
8 in the ability to interact appropriately with the public and five
9 additional moderate limitations. (Tr. 252-53.) The ALJ summarized
10 Dr. Gentile's opinion, then noted "these limitations were assessed
11 without taking into consideration the claimant's substance abuse."
12 (Tr. 20.) Without citing the record or making any other argument,
13 Plaintiff asserts, "This is wrong. Dr. Gentile did consider Ms.
14 Dugan's substance abuse and specifically reported Ms. Dugan's
15 limitation in her Psychiatric Review Technique form." (Ct. Rec. 12 at
16 14.) In fact, Dr. Gentile noted, "It is unclear from the MER (lack of
17 clear drug testing on admissions to psych) if clt [claimant] has a
18 drug-induced or psychotic process. Either way, clt does appear stable
19 on current meds and is functionally rated w/ that same level of
20 clarity on recent exam." (Tr. 250.) The ALJ's comment suggests he
21 may have erred by overlooking Dr. Gentile's note regarding the effects
22 of Plaintiff's substance abuse.⁴ However, Plaintiff's conclusion that

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24 ⁴It is noted that the ALJ's comment about Dr. Gentile's report is
25 ambiguous. The ALJ's statement that the limitations were assessed
26 "without taking into consideration the claimant's substance abuse"
27 could be interpreted to mean that Dr. Gentile did not separate the
28 effects of Plaintiff's substance abuse in making her diagnosis and

1 Dr. Gentile assessed Plaintiff's limitations notwithstanding her drug
2 abuse is faulty. Dr. Gentile's notes indicate she could not make a
3 determination as to whether Plaintiff's condition is drug-induced or
4 psychotic. (Tr. 250.) This does not assist the ALJ in determining
5 which of Plaintiff's limitations would remain without the effects of
6 drug and alcohol abuse. Thus, even if the ALJ had acknowledged Dr.
7 Gentile's comments about the effects of substance abuse, they would
8 have no impact on the ultimate determination of disability without the
9 effects of substance abuse. Errors that do not affect the ultimate
10 result are harmless errors. See *Parra v. Astrue*, 481 F.3d 742, 747
11 (9th Cir. 2007); *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990);
12 *Booz v. Sec'y of Health & Human Servs.*, 734 F.2d 1378, 1380 (9th Cir.
13 1984). Thus, although the ALJ may have incorrectly stated Dr. Gentile
14 did not address the effect of drug and alcohol abuse, the error is
15 harmless.

16 4. Dr. Klein

17 Although Plaintiff makes virtually no argument in support, she
18 suggests the ALJ improperly relied on the testimony of Dr. Klein, a
19 consulting physician who never treated or examined Plaintiff. (Ct.
20 Rec. 12 at 13.) The court does not reach this issue, as the ALJ's
21 error regarding the consideration of Dr. Mabee's report necessitates
22 _____
23 assessing limitations, which is in fact correct. It could also be
24 interpreted to indicate the ALJ did not see Dr. Gentile's comments
25 about the role of substance abuse in her assessment. The court
26 interprets the ALJ's statement in the light most favorable to the
27 Plaintiff, which suggests the ALJ erred by overlooking Dr. Gentile's
28 comments about substance abuse.

1 reconsideration of Dr. Klein's opinion, as well.

2 **5. Post-Decision Evidence**

3 Plaintiff also argues a second explanatory letter from Dr. Mabee
4 dated January 3, 2008, justifies a finding that Plaintiff is not
5 disabled. (Ct. Rec. 12 at 14-17.) Although the ALJ did not have the
6 opportunity to consider the letter, it is properly considered by the
7 court because the Appeals Council considered it in denying Plaintiff's
8 request for review. (Tr. 3-6); see *Harman v. Apfel*, 211 F.3d 1172,
9 1180 (9th Cir. 2000); *Ramirez v. Shalala*, 8 F.3d 1449, 1452 (9th Cir.
10 1993). However, evidence obtained after the ALJ has issued an adverse
11 determination is less persuasive. See *Weetman v. Sullivan*, 877 F.2d
12 20, 23 (9th Cir. 1989). The court concludes the contents of the letter
13 do not warrant reversal but, on remand, the ALJ shall consider all
14 relevant opinion evidence and weigh it accordingly.

15 **6. Period at Issue**

16 Lastly, Defendant raises an issue regarding the period covered by
17 the ALJ's decision. (Ct. Rec. 14 at 10.) On remand, the ALJ should
18 clarify the period covered by his decision and address any issues
19 relating to the timing of evidence and Plaintiff's dates last insured.

20 **7. Remedy**

21 The ALJ failed to provide sufficient reasons for rejecting the
22 opinions of Dr. Mabee, an examining psychologist. There are two
23 remedies where the ALJ fails to provide adequate reasons for rejecting
24 the opinions of a treating or examining physician. The general rule,
25 found in the *Lester* line of cases, is that "we credit that opinion as
26 a matter of law." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996);
27 *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990); *Hammock v.*
28 *Bowen*, 879 F.2d 498, 502 (9th Cir. 1989). Another approach is found

1 in *McAllister v. Sullivan*, 888 F.2d 599 (9th Cir. 1989), which holds
2 a court may remand to allow the ALJ to provide the requisite specific
3 and legitimate reasons for disregarding the opinion. *See also Benecke*
4 *v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004) (court has flexibility
5 in crediting testimony if substantial questions remain as to
6 claimant's credibility and other issues). Where evidence has been
7 identified that may be a basis for a finding, but the findings are not
8 articulated, remand is the proper disposition. *Salvador v. Sullivan*,
9 917 F.2d 13, 15 (9th Cir. 1990) (citing *McAllister*); *Gonzalez v.*
10 *Sullivan*, 914 F.2d 1197, 1202 (9th Cir. 1990). In this case, there may
11 be evidence in the record which the ALJ could cite to provide the
12 requisite specific, legitimate reasons for rejecting the opinions of
13 Dr. Mabee, so remand is the proper remedy.

14 CONCLUSION

15 Having reviewed the record and the ALJ's findings, the court
16 concludes the ALJ's decision is not supported by substantial evidence
17 and is based on legal error. On remand, the ALJ should reconsider the
18 psychological opinion evidence and support his findings regarding
19 those opinions with specific, legitimate evidence in the record. If
20 necessary, the ALJ should make a new residual functional capacity
21 finding and obtain testimony from a vocational expert. The ALJ should
22 also clarify the periods covered by the decision and consider the
23 relevant evidence as is appropriate. Accordingly,

24 IT IS ORDERED:

25 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 11**) is
26 **GRANTED**. The matter is remanded to the Commissioner for additional
27 proceedings pursuant to sentence four 42 U.S.C. 405(g).

28 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 13**) is

1 **DENIED.**

2 3. An application for attorney fees may be filed by separate
3 motion.

4 The District Court Executive is directed to file this Order and
5 provide a copy to counsel for Plaintiff and Defendant. Judgment shall
6 be entered for Plaintiff and the file shall be **CLOSED**.

7 DATED May 5, 2009.

8
9 S/ CYNTHIA IMBROGNO
10 UNITED STATES MAGISTRATE JUDGE
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